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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

IN THE CORPORATION COURT OF THE CITY OF NORFOLK.

STEELE et al. *v.* JAMES V. TREHY.

1. Elections—Contested Election—Pleading—Sufficiency of Allegation in Complaint.—In special statutory proceedings the issues presented in the complaint or petition must be set forth with particularity and in the form and manner prescribed by the statute, and only those issues so set forth will be considered.

2. Elections—Fraud—Pleading.—Under well-established rules of pleading, and especially under a statute providing a special proceeding requiring explicit definiteness for every charge, if a charge is made which clearly refers to a certain kind of irregularity of fraud, which avails of proof, it can not afterwards be made to apply to some other condition which develops during the hearing to which it can not be said to specifically refer.

3. Pleading.—If a pleading is so vague as to be susceptible of double construction or so general under the statute under consideration, as not to point out specifically wherein the objection lies, it is bad for want of definiteness.

4. Elections—Pleading—Sufficiency of Petition.—Under a petition in a contested election case alleging improper marking of ballots through conspiracy, stuffing the ballot boxes; voting by repeaters, voting by persons legally disqualified and miscounting, the court will not consider defects in the form of ballots because not bearing the official seal of the board of electors, such irregularity not being specifically alleged.

5. Elections—Official Ballot.—An official ballot under the Virginia statute is a ballot furnished by the electoral board of the county or city in which the ballot is to be voted bearing the seal of said board, the seal being essential to give officiality.

6. Statutes—Construction.—Section 122h of Code 1904, after prescribing the ballot to be used and the manner in which it shall be scratched by the voter, provides further that no ballot save an official ballot prepared as provided for, shall be counted for any person. Held, that this negative clause makes it mandatory upon the judges of election or upon the courts where the questions are properly raised by the pleadings not to count any ballot which is not an official ballot.

7. Statutes—Construction.—Where a negative clause follows the

requirement of a statute, there is no room for construction by the courts; the legislative intent must be given effect.

8. Elections—Fraud—Proof.—Where fraud is charged in the conduct of an election and the result can be explained on the ground of carelessness as fully as it can upon the ground of fraud, it is the duty of the court to so hold.

9. Elections—Fraud—Evidence.—Evidence held sufficient to show that errors in the conduct of an election were occasioned by hurry and carelessness and to negative the idea of fraud.

10. Elections—Fraud—Proof.—In order to bring fraud home to the judges of an election in voting men who were not present and who did not vote, it is necessary to show that they knew the original and the impersonator.

11. Elections—Fraud—Proof.—The use of a card system in checking voters, even if designed for fraudulent use or used fraudulently by persons about the polls, could not impute fraud to the election officials.

12. Elections—Fraud—Marking Ballots.—The fact that judges marked ballots which they should not have marked or inspected ballots which they should not have inspected, does not of itself constitute fraud.

13. Elections—Fraud.—Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud courts are disposed to give effect to elections when possible.

14. Elections—Fraud—Rejection of Entire Poll.—Where the court can not determine, on account of irregularities, which candidate received a majority, the entire poll should be rejected. But the power to throw out an entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental and so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatsoever.

15. Elections—Fraud—Reception of Illegal Votes.—Where it can be reasonably ascertained which were legal and which illegal and the result is not changed, a bare reception of illegal votes, whatever may be the nature of their illegality, will not nullify the election at any one precinct.

16. Elections—Fraud—Evidence.—Evidence held insufficient to show a total number of fraudulent votes sufficient to change the result.

17. Elections—Presumption of Legality.—The presumption is in favor of correct and honest action on part of election authorities, and the presumption is that the ballot reflects the wishes of the voter. These presumptions are not to be lightly abandoned or overthrown.

18. Elections—Statutory Regulation—Scope of Review.—If the law itself declares a specific irregularity to be fatal, the courts will follow that command irrespective of their view of the importance of the command. In the absence of such declaration the judiciary endeavor as best they may, to discern whether the deviation from the prescribed forms of the law had, or had not, so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the return, otherwise it is considered immaterial.

19. Elections—Statutory Provisions—Construction.—Statutory or constitutional provisions are not mandatory unless they are plainly of such a character that their strict enforcement is necessary to a correct determining of the result of an election, or unless in the law itself it is expressly declared that its violation will render the election void. The same provisions of the law may be construed to be only directory in so far as they affect the electors; and the disregard of the terms of such a statute by an officer will not render an election void, or justify the throwing out of the ballots, where it is not alleged that there was any fraud practiced, or that the result was affected or made doubtful by such official disregard of the law.

20. Elections—Secret Ballot.—The vote by ballot *ex vi termini* implies secret ballot even in the absence of constitutional or statutory provision. The secrecy of the ballot is a right which inheres in the voter, and of which he can not, against his will, be lawfully deprived. It must be, however, in some degree subordinate to the right to vote by ballot of which it is but a part, and the main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy.

21. Elections—Secret Ballot—Fraud—Evidence.—The improper inspection by election officials of ballots and the violation of the right of secrecy held not sufficient to vitiate the vote or the election at the fifth and sixth precincts and that they should not be thrown out on that account.

Complaint by Leon C. Steele et al. *v.* James V. Trehy under § 160 of the Code of Virginia to declare the election of James V. Trehy as clerk of the corporation court of the city of Norfolk illegal. Decree in favor of contestee, and complaint ordered dismissed.

James E. Heath, Toy D. Savage, G. A. Wingfield, C. J. Collins and William Simpson for contestants.

R. Randolph Hicks, Robert B. Tunstall and Walter H. Taylor for contestee.

Judge R. H. L. CHICHESTER sitting for Judge ALLAN R. HANCKEL.

Note.

Our courts are not in accord on the question of what are and what are not official ballots and the effect of the violation of some of the

requirements regarding the preparation of the ballots. As pointed out by Judge Chichester in the opinion in the present case, there is no appeal to the supreme court of the state which could settle the question as to what is an official ballot and he suggests that as no judicial determination can be obtained binding on all the courts of the commonwealth that the legislature should define the term as used in § 122h or amend the law so there will be no further doubt.

In the case of *Simmons et al. v. Land*, in the circuit court of Prince Ann County (reported in 19 VIRGINIA LAW REGISTER 890) Judge West takes the view that the failure to put the impress of the seal upon the ballots where all the other requirements of the statute have been complied with will not destroy the official character of the ballot. In that case it seems that the ballots were sealed by placing many under the seal at the same time, those at the bottom receiving a deep impression and those next a slighter impression, and those at the top a very slight or no impression. The court said in that case: "Cases might arise in which this court would have no hesitancy in refusing to count unsealed ballots cast in an election, but never in a case where, like the case at bar, the circumstances tend to show that the ballots are not unofficial ballots and where the complaint failed to allege, as required by § 160 of Pollard's Code, the nature of the objection to the legality of the election in such a way as to give the contestee notice that an effort would be made to prove that unofficial ballots were used in the election."

SUPREME COURT OF APPEALS.

FURST-KERBER CUT STONE CO., Inc., *v.* WELLS et al.

March 12, 1914.

[81 S. E. 22.]

1. Mechanics' Liens (§ 149*)—Account—Sufficiency.—An account for cut stone furnished by a subcontractor, showing merely the total amount of the bill therefor and the balance due after deducting payments specified, does not show the material was contracted for as an entirety for a specified sum; and, not showing the amount of stone furnished or the prices charged therefor, it is not a sufficient basis for a lien under Code 1904, § 2477.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. § 149.* 9 Va.-W. Va. Enc. Dig. 769; 14 Va.-W. Va. Enc. Dig. 707; 15 Va.-W. Va. Enc. Dig. 669.]

2. Mechanics' Liens (§ 132*)—Time for Filing Claim.—A lien cannot be acquired unless the claim therefor is filed as required by Code 1904, § 2476, within 60 days after the work is completed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.* 9 Va.-W. Va. Enc. Dig. 767; 14 Va.-W. Va. Enc. Dig. 706; 15 Va.-W. Va. Enc. Dig. 669.]

3. Bankruptcy (§ 138*)—Property Vesting in Trustee.—A subcon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.